No. 80-242

In the Supreme Court of the United States

OCTOBER TERM, 1980

EDWARD HIDALGO,
SECRETARY OF THE NAVY, PETITIONER

v.

ALICE NAKSHIAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether the plaintiff in an action against the federal government under Section 15(c) of the Age Discrimination in Employment Act, 29 U.S.C. 633a(c), is entitled to trial by jury.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 628 F.2d 59. The opinion of the district court (Pet. App. 27a-32a) and supplemental opinion of the district court (Pet. App. 33a-35a) are reported at 481 F. Supp. 159.

JURISDICTION

The judgment of the court of appeals (Pet. App. 36a-37a) was entered on February 19, 1980, and a petition for rehearing was denied on May 5, 1980 (Pet. App. 38a-40a). On July 29, 1980, the Chief Justice extended the time within which to file a petition for a writ of certiorari to August 18, 1980. The petition was filed on that date and was granted on December 1, 1980. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Age Discrimination in Employment Act are set forth in the appendix to the petition for a writ of certiorari (Pet. App. 41a-45a).

STATEMENT

1. Respondent brought this action in the United States District Court for the District of Columbia against the Secretary of the Navy, alleging violations of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621 *et seq.* She demanded a jury trial, and the government moved to strike that demand (Pet. App. 2a-3a). The district court denied

the motion to strike (Pet. App. 27a-35a) but certified for interlocutory appeal under 28 U.S.C. 1292 (b) the question whether a jury trial is available in an ADEA action against the federal government (Pet. App. 2a). The court of appeals granted the government's petition for interlocutory review (*ibid.*).

2. A divided panel of the court of appeals affirmed (Pet. App. 1a-26a). The majority noted that there is no constitutional basis for jury trials in ADEA cases against the federal government because "the Seventh Amendment does not apply to suits against the Government" (*id.* at 5a). The majority also acknowledged the "absence of explicit statutory authorization" for jury trials in such cases (*id.* at 10a). But the court nonetheless found what it believed to be "enough evidence to support an inference that Congress intended to provide for jury trials" (*ibid.*). It relied on two factors.

First, the court of appeals found that "the very fact that Congress gave jurisdiction over ADEA suits against the federal government to the District Courts rather than the Court of Claims supports the inference that there is a right to jury trial in such cases" (Pet. App. 10a). Second, the court found this inference to be "strengthened" by Congress' authorization in Section 15(c) of the Act, 29 U.S.C. 633a (c), for the award of "*legal* and equitable relief" against the government (Pet. App. 11a; emphasis supplied by the court). The court noted that in *Lorillard* v. *Pons*, 434 U.S. 575 (1978), this Court had relied in part upon the authorization for the award of "legal" relief under Section 7(c) of the Act, 29 U.S.C. 626(c), in finding, as a matter of statutory construction, that there is a right to a jury trial in an ADEA action against a private employer under that section, and the court of appeals reasoned

that Congress must be assumed to have conferred the same right in suits against the federal government because it also used the word "legal" in Section 15(c).

Judge Tamm dissented (Pet. App. 15a-26a). He observed that the legislative history of the Fair Labor Standards Act Amendments of 1974, in which Congress enacted the present Section 15 of the AEDA, 29 U.S.C. 633a, to provide protection against age discrimination for federal employees,[1] "does not mention the issue of jury trials under section [15]" (Pet. App. 19a). Judge Tamm also noted that when Congress amended Section 7(c) of the Act in 1978 to provide for the right to jury trial in cases brought against private employers (and state and local governments), it did not amend Section 15(c) to provide for jury trials in cases brought against the federal government (Pet. App. 21a-22a). This failure to amend Section 15(c), he reasoned, "cannot be deemed inadvertent" because Congress amended Section 15 in other respects (Pet. App. 22a n.8). In Judge Tamm's view, moreover, Congress' decision to extend protection against age discrimination to federal employees "does not necessarily mean Congress intended to establish the same procedures for federal employees to enforce those protections" as were then available to employees in the private sector (*id.* at 20a).

Finally, Judge Tamm found the majority's reliance on *Lorillard* misplaced because the allowance of jury trials against the federal government raises "different concerns" than do jury trials involving private employers (Pet. App. 23a). By the same

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[1] Section 15 of the ADEA was added by Section 28(b)(2) of the Fair Labor Standards Act Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 74.

token, Judge Tamm concluded (*id.* at 24a) that the majority erred in focusing on Congress' use of the phrase "legal * * * relief" in Section 15(c). The Court in *Lorillard* found that phrase to be useful in discerning congressional intent regarding the availability of jury trials in suits against private employers because the phrase is a term of art that is relevant in determining when the Seventh Amendment right to a jury trial attaches in suits between private parties. Accordingly, Judge Tamm was of the view that the authorization of "legal" relief has no relevance in construing Section 15(c) because the Seventh Amendment does not apply to suits against the federal government.[2]

SUMMARY OF ARGUMENT

A.

The Seventh Amendment guarantee of trial by jury does not apply in actions against the federal government, because there was no such right in suits against the sovereign when the Amendment was adopted in 1791. As a result, the plaintiff in an action against the federal government has a right to trial by jury only where Congress has affirmatively granted that right by statute.

The general experience has been that when Congress waives the sovereign immunity of the United States, it does not provide for jury trials. Such trials historically have not been available in the broad range of cases subject to the Court of Claims' jurisdiction under 28 U.S.C. 1491, which includes claims

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[2] The government's petition for rehearing and suggestion for rehearing en banc were denied, with four judges dissenting (Pet. App. 38a-40a).

arising under "any Act of Congress." Jury trials also are barred where the district courts have jurisdiction concurrent with that of the Court of Claims over this same range of cases, as well as under the Federal Tort Claims Act. See 28 U.S.C. 2402.

Congress' reluctance to provide for trial by jury in actions against the government is based in part on the concern that juries might be unduly sympathetic to the plaintiff because of the virtually unlimited ability of the government to satisfy an adverse judgment. Because the availability of jury trials may therefore affect the extent of the government's liability, courts should insist that the intent to confer a right to trial by jury in actions against the United States, like the waiver of sovereign immunity itself, be unequivocally expressed by Congress.

B.

1. Section 15 of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 633a, establishes separate substantive and procedural provisions relating to age discrimination in federal employment. Subsection (c) of Section 15, which authorizes a person aggrieved to bring a civil action against the government, does not authorize such actions to be tried to a jury. In contrast, Section 7(c) of the Act, which authorizes civil actions against private employers and state and local governments, expressly provides for jury trials. There is nothing in the legislative history to indicate that Congress did not mean what it said in providing for jury trials in cases under Section 7(c) but not in cases against the federal government under Section 15(c). Indeed, the legislative history contains not a single reference to the issue of jury trials in federal sector cases, and

any inferences that may be drawn from the legislative history on this question cut against the availability of jury trials.

2. a. As originally enacted in 1967, the ADEA applied only to the private sector, not to federal, state, and local government. Section 7 of the Act, 29 U.S.C. 626, incorporated the enforcement scheme utilized to enforce a private employer's liability for unpaid minimum wages and overtime compensation under the Fair Labor Standards Act (FLSA). In *Lorillard* v. *Pons*, 434 U.S. 575 (1978), the Court held that, because a right to trial by jury had been recognized in actions to recover unpaid minimum wages and overtime compensation from private employers under the FLSA, Congress must have intended the same result in an action against a private employer under Section 7 of the ADEA. The holding in *Lorillard* was codified by Congress in 1978 when it amended Section 7(c) of the ADEA to provide for jury trials in actions brought under that section.

b. In 1974, Congress expanded the definition of the term "employer" in the ADEA to include state and local governments, thereby extending the then-existing substantive and procedural provisions of the Act, including Section 7(c), to cover state and local government employees. But Congress added a separate Section 15 to the ADEA in 1974 governing age discrimination in federal employment. Section 15 contains its own substantive and procedural provisions, and, unlike Section 7, it does not incorporate the FLSA enforcement scheme. Rather, Section 15 is patterned after Section 717 of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16, which was added in 1972 to prohibit other forms of discrimination in federal employment. Because a right to trial by jury

had not been recognized even in suits against private employers under Title VII, as it had been under the FLSA, Congress' decision to pattern Section 15 of the ADEA after Title VII reinforces the conclusion that jury trials are not available against the federal government.

c. Congress declined an opportunity to extend the jury trial right to the federal sector when it amended the ADEA in 1978. Prior to the decision in *Lorillard*, the Senate, but not the House, had included in a pending bill to revise the ADEA an amendment to Section 7(c) to provide for jury trials. After the decision in *Lorillard*, the Conference Committee reported the bill containing a somewhat revised version of the jury trial provision in Section 7(c) that had been passed by the Senate. The Conference Committee also made several additions to Section 15, but did not include a provision for jury trials in civil actions brought against the federal government under that section. Significantly, the Conference Committee recommended and Congress enacted a new Section 15(f), 29 U.S.C. (Supp. II) 633a(f), providing that federal personnel actions covered by Section 15 are not subject to any other section of the ADEA, with one exception not relevant here. Since this new Subsection (f) clearly emphasized for the Conference Committee and the entire Congress that Section 15 is wholly self-contained and therefore unaffected by the jury trial and other procedural provisions applicable in the private sector under Section 7, Congress could not have overlooked the need to amend Section 15 to provide for jury trials in federal sector cases if it wished to do so. Again, the only inference that can be drawn is that Congress

chose to follow the established practice of not allowing jury trials in actions against the United States.

C.

1. Despite the absence of any indication in the text or legislative history of Section 15 of an intent to confer a right to trial by jury, the court of appeals found that Congress' provision in Section 15(c) for ADEA cases to be brought against the federal government "in any Federal district court of competent jurisdiction," rather than in the Court of Claims (where jury trials historically have not been available), supported an inference that Congress intended cases brought under Section 15(c) to be tried to a jury. But Congress apparently never considered the possibility of Court of Claims jurisdiction under Section 15, and there is no indication that Congress believed the reference to district court jurisdiction had any significance for jury trial purposes.

Furthermore, there are a number of reasons, wholly unrelated to jury trials, why Congress may have provided for district court jurisdiction in federal sector ADEA suits. District courts (along with state courts) already had jurisdiction over private sector ADEA cases under Section 7(c). It is therefore not surprising that Congress took the same approach under Section 15(c). Suits under Title VII, after which Section 15 is patterned, are also brought in federal district court, and Congress may simply have wished to follow the same course under the ADEA. And, finally, Congress may have thought district court jurisdiction appropriate because Section 15(c) authorizes the award of equitable relief, which the Court of Claims ordinarily does not grant.

Thus, this case is not like *United States* v. *Pfitsch*, 256 U.S. 547 (1921), where Congress actually rejected a proposal to confer concurrent jurisdiction on the district courts and Court of Claims under the Tucker Act and instead conferred a new exclusive jurisdiction on the district courts. In the particular circumstances of that case, the Court could conceive of no rational ground for conferring exclusive jurisdiction on the district courts except to provide for jury trials.

2. Nor, contrary to the court of appeals' holding, does the provision in Section 15(c) for the award of "legal" as well as equitable relief support an inference of an affirmative grant of a right to trial by jury in actions brought against the federal government. In *Lorillard*, the authorization for the award of "legal" relief was significant only because of the presence of a constitutional question in the case. The Court observed that where legal relief is granted in litigation between private parties, the Seventh Amendment ensures a right to trial by jury. Accordingly, the Court reasoned, Congress must have been aware of the significance of the use of the word "legal" in that context and must have intended that actions under Section 7(c) be tried to a jury. But the Seventh Amendment has no application in actions at law against the federal government, and Congress therefore could not have attached any particular significance to the use of the term "legal" in Section 15(c).

ARGUMENT

TRIAL BY JURY IS NOT AVAILABLE IN SUITS AGAINST THE FEDERAL GOVERNMENT UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT

A. There Is No Right To Trial By Jury In Actions Against The United States Unless Congress Affirmatively Grants That Right In The Applicable Legislation

It is well settled that the Seventh Amendment right to trial by jury in suits at common law does not extend to civil actions against the federal government.[3] As this Court observed in *Galloway* v. *United States*, 319 U.S. 372, 388-389 (1943) (footnote omitted):

> The suit is one to enforce a monetary claim against the United States. It hardly can be maintained that under the common law in 1791 jury trial was a matter of right for persons asserting claims against the sovereign. Whatever force the Amendment has therefore is derived because Congress, in the legislation cited, has made it applicable.

See also *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 572 (1962) (Harlan, J.); *McElrath* v. *United States*,

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[3] The Seventh Amendment provides in pertinent part: "In Suits at common law, * * * the right of trial by jury shall be preserved * * *." This Court has explained that, "by referring to the 'common law,' the Framers of the Seventh Amendment were concerned with preserving the right of trial by jury in civil cases where it existed at common law * * *." *Colgrove* v. *Battin*, 413 U.S. 149, 155 (1973) (emphasis in original omitted). See also *Atlas Roofing Co.* v. *OSHRC*, 430 U.S. 442, 449, 459 (1977).

102 U.S. 426, 440 (1880). This is but a particular application of the general principle that "the United States, as sovereign, 'is immune from suit save as it consents to be sued * * * and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.' " *United States* v. *Testan*, 424 U.S. 392, 399 (1976), quoting *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941). See also *United States* v. *Mitchell*, 445 U.S 535, 538 (1980); *McElrath* v. *United States*, *supra*. Accordingly, if Congress waives the government's immunity from suit, there is a right to trial by jury only where availability of that right is one of "the terms of [the government's] consent to be sued." 424 U.S. at 399. This conclusion comports with Fed. R. Civ. P. 38(a), which provides for trial by jury only "as declared by the Seventh Amendment to the Constitution *or as given by a statute of the United States* * * *" (emphasis added).

The general experience has been that when Congress waives the sovereign immunity of the United States, it does *not* provide for trial by jury. For example, jury trials historically have not been available in the Court of Claims in the broad range of cases within its jurisdiction under 28 U.S.C. 1491—*i.e.*, all claims against the United States "founded either upon the Constitution, or *any* Act of Congress, * * * or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort" (emphasis added). See, *e.g.*, *Glidden Co.* v. *Zdanok*, *supra*, 370 U.S. at 572; *McElrath* v. *United States*, *supra*, 102 U.S. at 439-440; Richardson, *History, Jurisdiction, and Practice of the Court of Claims*, 17 Ct. Cl. 3, 24 (1882). Similarly, Congress has provided that there is no right to trial by jury in this same broad range of cases where the district courts have concurrent

jurisdiction because the amount in controversy does not exceed $10,000. See 28 U.S.C. 1346(a)(2) and 2402. And in cases against the United States sounding in tort (see 28 U.S.C. 1346(b))—apparently the only general category of cases involving legal relief not covered by the foregoing grants of jurisdiction to the Court of Claims and district courts—Congress likewise has provided that the trial shall be to the court without a jury. 28 U.S.C. 2402.[4] Indeed, it appears that Congress has departed from this pattern only once in recent times, when it amended 28 U.S.C. 2402 in 1954 to permit jury trials in tax refund suits in district court under 28 U.S.C. 1346(a)(1). See Act of July 30, 1954, ch. 648, Section 2(a), 68 Stat. 589. The House Committee observed that the legislation would establish a "wholly new precedent" because "for the first time jury trials would be per-

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[4] As Judge Tamm observed in dissent (Pet. App. 25a-26a, quoting 5 J. Moore, *Federal Practice* ¶ 38.31[2], at 234-235 (2d ed. 1979); footnote omitted):

> Jury trials, though favored, are not always permitted. This favor does not extend to suits against the government. "[W]hile statesmen and jurists are often wont to extol the virtues of jury trial, they are not accustomed to extend the virtues to actions against the United States, either in the Court of Claims or in the district courts."

Accordingly, there is no basis for the court of appeals' suggestion (Pet. App. 9a n.4) that a supposed "preference for jury trials in our jurisprudence would support a presumption in favor of such trials" when the government is sued. The error in this assertion is sufficiently demonstrated by the fact that in damage actions sounding in tort or contract—precisely the type of common law suits in which the Seventh Amendment would guarantee a right to trial by jury where private parties are involved—Congress provided in 28 U.S.C. 2402 that trial would be to the court sitting without a jury.

mitted in suits against the Government." H.R. Rep. No. 659, 83d Cong., 1st Sess. 3 (1953).[5]

Congress' demonstrated reluctance to provide for jury trials against the United States no doubt stems from the fear, articulated when it fashioned the narrow exception in 28 U.S.C. 2402 for tax refund cases, that juries "might tend to be overly generous because of the virtually unlimited ability of the Government to pay the verdict." H.R. Rep. No. 659, *supra*, at 3;[6]

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[5] But see pages 31-34, *infra*.

[6] Prior to the time the 1954 legislation was enacted, a taxpayer could bring a common law action against the collector of revenue, in his personal capacity, to recover taxes the collector had illegally or erroneously received. See H.R. Rep. No. 659, *supra*; S. Rep. No. 115, 83d Cong., 1st Sess. 2 (1953). Any judgment awarded against the collector was paid by the United States where the district court certified that there was probable cause for the collector's actions or that he was following instructions. H.R. Rep. No. 659, *supra*, at 3-5; 28 U.S.C. (1952 ed.) 2006. But because the action was one at law against the collector in his personal capacity, the plaintiff had a right to trial by jury. *Wickwire* v. *Reinecke*, 275 U.S. 101, 104-105 (1927); *Civil Actions in District Courts to Recover Taxes: Hearing on S. 252 Before a Subcomm. of the Senate Judiciary Comm.*, 83d Cong., 1st Sess. 3 (1953). (hereinafter referred to as "*Hearing*"). See generally Plumb, *Tax Refund Suits Against Collectors of Internal Revenue*, 60 Harv. L. Rev. 685 (1947). Such a common law action, however, had to be brought in the district court in which the director resided (see 28 U.S.C. (1952 ed.) 1391)), which might have proved inconvenient for the taxpayer. H.R. Rep. No. 659, *supra*, at 2; *Hearing*, *supra*, at 3-6.

Congress decided to confer a statutory right to trial by jury in actions against the United States under 28 U.S.C. 1346(a)(1), which could be brought in the district where the taxpayer resided (28 U.S.C. 1402(a)), in order to prevent the taxpayer from having to forgo a jury trial in order to sue in a convenient forum. Since a jury trial was already available in an action brought against the director in his personal capacity, Congress believed that the amendment

see also *Domenico Ruggiero* v. *Compania Peruana de Vapores "Inca Capac Yupanqui,"* Nos. 80-7595, 7597 and 7599 (2d Cir. Jan. 15, 1981), slip op. 1060. This apprehension, rooted in common sense, counsels caution in finding a right to jury trial against the government. The Court has emphasized that waivers of sovereign immunity cannot be implied, but must be "unequivocally expressed." *United States* v. *Mitchell, supra*, 445 U.S. at 538, quoting *United States* v. *King*, 395 U.S. 1, 4 (1969). And even where the waiver is so expressed, it is to be strictly construed. *United States* v. *Kubrick*, 444 U.S. 111, 117-118 (1979); *United States* v. *Sherwood*, 312 U.S. 584, 590 (1941). The purpose of these rules of construction is to conserve the public fisc and to limit recovery to those situations in which it may confidently be concluded that Congress has determined the government should be liable. See, *e.g.*, *Indian Towing Co.* v. *United States*, 350 U.S. 61, 68-69 (1955).

Like the waiver of immunity from suit itself, "limitations and conditions upon which the Government consents to be sued must be strictly observed

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would not have much of a practical effect—especially because the United States defended the action against the director (*Hearing, supra*, at 6; 28 U.S.C. (1952 ed.) 507(a)(3)) and ordinarily paid the judgment in either event. See H.R. Conf. Rep. No. 2276, 83d Cong., 2d Sess. 2 (1954). Congress also reasoned that there was no greater danger of excessive verdicts as a result of jury trials where the action was brought against the United States rather than the director, because in either case the recovery was limited to the amount of taxes illegally or erroneously collected (*ibid.*). In these circumstances, the House conferees finally retreated from their position—which had held up passage of the bill for a year (100 Cong. Rec. 11362 (1954))—that "it would be a harmful precedent to permit jury trials in cases of this class" (H.R. Conf. Rep. No. 2276, *supra*, at 2). The unique considerations that prompted the exception in 28 U.S.C. 2402 obviously have no application in the present case.

and exceptions thereto are not to be implied." *Soriano* v. *United States*, 352 U.S. 270, 276 (1957). See also *United States* v. *Kubrick*, *supra*, 444 U.S. at 117-118. One such condition commonly imposed—trial to the court rather than by jury—conserves the public fisc by helping to ensure that a judgment will be awarded against the United States only in truly meritorious cases, as determined by impartial judges, not on the basis of what a jury might perceive to be the deep pocket of the government. Therefore, Congress' decision whether to grant or withhold a right to jury trial under a particular statute concerns more than an incidental matter of procedure, as the court of appeals appeared to believe (Pet. App. 8a-9a). That decision may well affect the extent of the government's liability in an entire category of cases; at the very least, Congress is entitled to conclude that it might. Because of this potential effect on the government's monetary liability, the Court must insist that the grant of a right to trial by jury in suits against the federal government, like the consent to suit itself, be "unequivocally expressed." Such a rule is especially appropriate in light of Congress' ordinary practice in the past of withholding the jury trial right in cases against the government.[7]

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[7] The court of appeals rejected the suggestion that the United States enjoys a "sovereign immunity from jury trial that can only be waived by explicit statutory language or legislative history" (Pet. App. 8a). In the court's view (*id.* at 8a-9a), the doctrine of sovereign immunity bars suits against the government, but not any particular mode of trial in the event the bar to suit is waived.

We leave for others to decide whether the proper description of the settled rule is "sovereign immunity from jury trial." For whatever the label, it is clear that the doctrine of sovereign immunity must inform the Court's decision in

As we demonstrate below, when it enacted and amended the ADEA Congress did not depart from its usual practice in this area by affirmatively and unequivocally granting a right to trial by jury in actions against the federal government.

B. Section 15 Of The Age Discrimination In Employment Act Does Not Provide For A Right To Trial By Jury

1. *The Language of the Act*

It is by now axiomatic that "the starting point for interpreting a statute is the language of the statute itself." *CPSC* v. *GTE Sylvania, Inc.*, No. 79-521 (June 9, 1980), slip op. 5. See also *Rubin* v. *United States*, No. 79-1013 (Jan. 21, 1981), slip op. 5; *Lewis* v. *United States*, 445 U.S. 55, 60 (1980). Section 15 of the ADEA, 29 U.S.C. 633a, prohibits discrimination in federal employment on the basis of age. Section 15(c), which sets forth the judicial en-

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this case. It is precisely because of the government's sovereign immunity from suit that the Seventh Amendment and its constitutionally mandated presumption in favor of jury trials do not apply in actions at law against the United States. Because there is no generally applicable jury trial right that automatically attaches when the United States waives its immunity from suit, the actions to which Congress has consented will not be tried to a jury unless Congress goes further and affirmatively so provides in the legislation creating the cause of action. We deem it of little importance whether the requisite statutory grant of the jury trial right is viewed as a "waiver" of an otherwise applicable "sovereign immunity" from jury trials or, instead, as a condition to recognition of a right to jury trial that is necessary *because* of the doctrine of sovereign immunity. In either event, accepted principles of sovereign immunity require that a statutory grant of the right not be lightly implied.

forcement mechanism to support this substantive guarantee, provides that any person aggrieved "may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes" of the Act. Nothing in this or any other portion of Section 15 provides that the civil action may be tried to a jury.

In contrast, Section 7(c) of the Act, 29 U.S.C. (Supp. II) 626(c), which authorizes civil actions against private employers and state and local governments, *expressly* provides for trial by jury. Thus, Congress demonstrated in the very statute involved here that it knew how to provide a statutory right to trial by jury when it wished to do so; yet it failed to furnish such a right in Section 15(c). See *Fedorenko* v. *United States*, No. 79-5602 (Jan. 21, 1981), slip op. 20-21. For this reason, the text of the Act would seem to furnish a complete answer to respondent's contention that she is entitled to a jury trial in this case.

But no statute is so plain that resort to the legislative history is forbidden. See, *e.g.*, *United States* v. *Culbert*, 435 U.S. 371, 374 n.4 (1978); *Train* v. *Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 10 (1976). As we now show, nothing in the legislative history supports respondent's construction of the Act. Like the court of appeals, respondent has been unable to cite even a single reference in the pertinent materials to the issue of jury trials in ADEA actions brought against the federal government, much less an "unequivocal expression" of intent to confer that right. Indeed, any inferences that may be drawn from the legislative history cut strongly against respondent's position.

2. *The Legislative History*

a. Background: Section 7 of the 1967 Act and the *Lorillard* Decision

When the ADEA was first enacted in 1967, the definition of the term "employer," to which the Act's prohibitions applied (Section 4(a), 29 U.S.C. 623 (a)), expressly excluded the United States or a state or political subdivision. See Pub. L. No. 90-202, Section 11, 81 Stat. 605, 29 U.S.C. (1970 ed.) 630 (b).[8] Section 7 of the Act contained the provisions for its enforcement in the private sector. Section 7(b) then provided, as it does now, that the Act was to be enforced in accordance with the "powers, remedies, and procedures" utilized in enforcing the Fair Labor Standards Act (FLSA) (29 U.S.C. 201 *et seq.*),[9] that violations of the ADEA were to be

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[8] Given this express exclusion on the face of the Act, there is no basis for respondent's contention, drawn from a committee report on the 1974 amendments to the Act, that "the omission of federal employees from the ADEA as originally enacted 'did not represent a conscious decision by Congress to limit the ADEA to employment in the private sector'" (Br. in Opp. 6, quoting S. Rep. No. 93-690, 93d Cong., 2d Sess. 55 (1974)). See *United States Railroad Retirement Board* v. *Fritz*, No. 79-870 (Dec. 9, 1980), slip op. 12; *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 758 (1979).

[9] The key FLSA enforcement provisions for purposes of private sector ADEA suits are those set forth in Sections 16(b) and (c), 29 U.S.C. 216(b) and (c). Section 16(b) confers a right of action for damages (including liquidated damages), restricts the availability of class action suits, and provides for the award of a reasonable attorney's fee and costs. This right of action is terminated, however, if the Secretary of Labor (now the EEOC, see note 11, *infra*) seeks an injunction against the employer in accordance with Section 17 of the FLSA, 29 U.S.C. 217. Moreover, under Section 16(c), the Secretary of Labor (now the EEOC) may sue on behalf of an employee, in which case the employee's right of action is also terminated.

deemed violations of Section 15 of the FLSA (29 U.S.C. 215), and that amounts owing to an employee were to be deemed unpaid minimum wages or overtime compensation for purposes of recovery pursuant to Sections 16 and 17 of the FLSA (29 U.S.C. 216 and 217). Section 7(c) authorized the person aggrieved to bring a civil action in a court of competent jurisdiction for such "legal or equitable relief" as would effectuate the purposes of the Act, and Section 7(b) authorized the court to award such relief, including "judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation * * *."

Section 7(c), as originally enacted in 1967, did not expressly provide for trial by jury. However, in *Lorillard* v. *Pons*, 434 U.S. 575 (1978), the Court held that the plaintiff in a suit against a private employer under Section 7(c) has a right to a jury trial. The Court inferred such a right as a matter of statutory construction, even in the absence of language in the Act expressly so providing, because it was "fairly possible" to interpret Section 7(b) and (c) as affording that right and thereby to avoid the constitutional question of whether the Seventh Amendment guarantee applied. 434 U.S. at 577, quoting *United States* v. *Thirty-Seven Photographs*, 402 U.S. 363, 369 (1971), and *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932).

In inferring the right to jury trial, the Court relied principally on the incorporation of FLSA procedures into Section 7(b) and the provision for lost wages to be treated as unpaid minimum wages or overtime compensation to be recovered pursuant to the FLSA. The Court observed that it was well es-

tablished prior to enactment of the ADEA in 1967 that there was a right to jury trial in private actions under the FLSA, and it concluded that Congress must have intended the same result to obtain in actions brought under the ADEA. 434 U.S. at 581-583. The Court found this inference of a jury trial right to be "buttressed" by the authorization in Section 7(b) and (c) for the award of "legal" as well as equitable relied. The Court assumed that Congress knew that a jury trial is guaranteed by the Seventh Amendment when legal rights are determined and legal relief is available and therefore must have intended that there would be a jury trial on demand in an action brought to enforce liability for lost wages deemed to be unpaid minimum wages or overtime compensation under the FLSA. 434 U.S. at 583. The result in *Lorillard* was codified by Congress in 1978, when it added a new paragraph (2) to Section 7(c) to provide for trial by jury in an action for recovery of amounts owing as a result of a violation.[10]

b. The 1974 Amendments

In Section 28(b)(2) of the Fair Labor Standards Act (FLSA) Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 74, Congress added an entirely new

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[10] Section 4(a) of Pub. L. No. 95-256, 92 Stat. 190, redesignated the civil action provision in Section 7(c) as paragraph (1) of that section and added a new paragraph (2) affording the jury trial right. Paragraph (2), as codified at 29 U.S.C. (Supp. II) 626(c)(2), provides:

> In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

Section 15 to the ADEA governing age discrimination in federal employment. 29 U.S.C. 633a. This new section did not extend the coverage of the original ADEA provisions to the federal sector by expanding the definition of the term "employer" to include the federal government, as was done in extending coverage to state and local governments. See Section 11(b) of the Act, 29 U.S.C. 630(b). Instead, Congress prescribed a distinct statutory scheme applicable only to the federal sector.

Subsection (a) of Section 15 states a separate substantive policy providing that all personnel actions affecting federal employees or applicants for employment "shall be made free from any discrimination based on age." 29 U.S.C. 633a(a). Subsection (b) of Section 15 directs the Civil Service Commission (now the Equal Employment Opportunity Commission)[11] to issue implementing regulations and orders and to enforce the provisions of subsection (a) in individual cases "through appropriate remedies, including reinstatement or hiring of employees with or without backpay, as will effectuate the policies * * *" of Section 15. 29 U.S.C. 633a(b). There is no comparable provision for administrative adjudication of complaints in the case of private or state and local government employees. See Section 7(d) of the ADEA, 29 U.S.C. 626(d). Subsection (c) of Section 15 contains a separate provision authorizing a person aggrieved by age discrimination in federal employment to bring a civil action in federal district court (29 U.S.C. 633a(c)); Congress did not simply provide for

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[11] The functions of the Civil Service Commission under Section 15(b) of the ADEA and the functions of the Secretary of Labor under other Sections of the Act were transferred to the EEOC by Section 2 of Reorganization Plan No. 1 of 1978, 92 Stat. 3781.

federal sector ADEA actions to be brought pursuant to Section 7(c) of the Act in the same manner as those against private employers.[12] Significantly, moreover, Section 15 does not incorporate FLSA "powers, remedies, and procedures," does not provide that violations of the section are to be treated as violations of the FLSA, and does not refer to "amounts owing" as a result of a violation of Section 15 or deem any such amounts to be unpaid minimum wages or overtime compensation for purposes of recovery pursuant to the FLSA. Indeed, as noted above, subsection (b) of Section 15 provides for hiring and reinstatement of employees "with or without backpay," thereby establishing that the recovery of lost wages in federal sector cases under Section 15 is a matter of sound equitable discretion (see, *e.g.*, *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 415-~~442~~ (1975); see pages 39-40, *infra*), not an absolute entitlement, as under Section 7(b) and the FLSA. Thus, it is clear that Congress separated out federal sector cases for quite different treatment. See *Bradley* v. *Kissinger*, 418 F. Supp. 64, 66 (D.D.C. 1976).[13] The legislative history of the 1974 Amendments confirms that the decision to do so was deliberate.

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[12] Compare 42 U.S.C. 2000e-16(c) and (d).

[13] The House Report on the 1974 FLSA Amendments states that Section 28 "extends the provisions of the [ADEA] to State and local governments and their related agencies." H.R. Rep. No. 93-913, 93d Cong., 2d Sess. 16 (1974). In contrast, the Report remarks that Section 28 "[s]tates a policy of nondiscrimination on account of age in the federal government, and authorizes the U.S. Civil Service Commission to enforce that policy" (*ibid.*). The report therefore distinguishes between an "extension" of the coverage of ADEA itself and the new "policy" in Section 15, to be enforced by the Civil Service Commission.

The first attempt to prohibit age discrimination in federal employment was a bill introduced by Senator Bentsen on March 9, 1972 (S. 3318, 92d Cong., 2d Sess.; 118 Cong. Rec. 7745 (1972)). This bill simply would have amended the definition of "employer" in Section 11(b) of the Act, 29 U.S.C. 630 (b), to include the federal government, as well as state and local governments. The result would have been to bring federal employees directly under the substantive antidiscrimination provisions in Section 4 of the Act and, we may assume, the procedural provisions in Section 7. But Senator Bentsen subsequently submitted a revised version of his bill in the form of an amendment to pending FLSA amendments. See 118 Cong. Rec. 15894 (1972). In contrast to Senator Bentsen's original bill, this amendment to the ADEA proposed an expansion of the definition of the term "employer" only with respect to state and local governments; ADEA coverage of federal employees was to be accomplished by the addition of an entirely new and separate section to the Act—the present Section 15. Senator Bentsen's amendment was included in the FLSA bill reported by the Committee on Labor and Public Welfare, S. Rep. No. 92-842, 92d Cong., 2d Sess. 93-94 (1972), and it remained in this form until the bill ultimately was passed in 1974.[14]

Sections 15(a) and 15(b) of the ADEA, as offered by Senator Bentsen and as finally enacted, are in all material respects patterned after Section 717(a) and (b) of the Civil Rights Act of 1964, as amended

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[14] The 1972 bill was not enacted, but the same provisions were eventually included in the House and Senate bills reported out of committee in 1974. See H.R. Rep. No. 93-913, 93d Cong., 2d Sess. 16, 40 (1974); S. Rep. No. 93-690, 93d Cong., 2d Sess. 55-56 (1974). These provisions remained in the final enactment. See Pub. L. No. 93-259, Section 28(a), and (b)(2), 88 Stat. 74.

in March 1972,[15] which extend the protection of Title VII to federal employees. 42 U.S.C. 2000e-16(a) and (b). Indeed, Senator Bentsen, the principal sponsor of Section 15 of the ADEA, explained that "[t]he *measures* used to protect Federal employees [from age discrimination] would be substantially similar to those incorporated * * *" in the recently passed amendments to Title VII. 118 Cong. Rec. 24397 (1972) (emphasis added).[16] It is clear, then, that in federal sector ADEA cases Congress deliberately departed from the FLSA model it previously had followed in ADEA cases involving private employers (see *Lorillard* v. *Pons*, *supra*, 434 U.S. at 578-580) and adopted instead the Title VII enforcement scheme.[17]

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[15] See Pub. L. No. 92-261, 86 Stat. 111-112.

[16] This method of bringing federal employees within the protection of the ADEA—by adding a separate section and establishing different procedures patterned after Title VII—stands in marked contrast to the method Congress adopted in the same Act for extending FLSA coverage to federal employees. There, Congress brought federal employees under then-existing FLSA provisions applicable to private employees by amending the definition of the term "employer" to include the federal government. See Pub. L. No. 93-259, Section 5(a), 88 Stat. 56, 29 U.S.C. 203(d) and (e)(2) ("employer" redefined to include "public agency"; "individual employed by a public agency" defined to include federal employees as well as state and local government employees).

[17] It is understandable that Congress would pattern enforcement of the ADEA in the federal sector after Title VII. In *Lorillard* v. *Pons*, *supra*, the Court explained that Congress' decision to pattern procedures followed in ADEA cases against private employers after procedures used under the FLSA reflected "Congress' desire to use an existing statutory scheme and a bureaucracy with which employers and employees would be familiar" (434 U.S. at 578-579). Since

This departure is especially pertinent to the jury trial issue in this case. The lower courts had held prior to enactment of the ADEA that there is a right to trial by jury in FLSA cases against private employers, and for this reason the Court concluded in *Lorillard* v. *Pons, supra,* that there is a similar right under Section 7 of the ADEA by virtue of Congress' incorporation of the FLSA enforcement scheme. 434 U.S. at 580-583 & n.7. In contrast, a right to trial by jury has not been recognized in cases under Title VII, after which Section 15 of the ADEA is patterned. See *Lorillard* v. *Pons, supra,* 434 U.S. at 583-584; *Great American Fed. Savings & Loan Ass'n* v. *Novotny,* 442 U.S. 366, 375 & n.19 (1979); *Curtis* v. *Loether,* 415 U.S. 189, 196-197 & n.13 (1974); see also *Blum* v. *Gulf Oil Corp.,* 597 F.2d 936, 938 (5th Cir. 1979); *Harmon* v. *May Broadcasting Co.,* 583 F.2d 410 (8th Cir. 1978). What is more, during floor consideration of the 1972 amendments to Title VII, the Senate rejected an amendment that would have conferred a statutory right to trial by jury in Title VII cases. 118 Cong. Rec. 4919-4920 (1972). Senator Javits, in opposing the amendment, observed that it would impose "what would be a special requirement in these cases, as distinguished from the antidiscrimination field generally, of jury trial." *Id.*

Congress had only recently extended Title VII to cover other types of discrimination by the federal government and charged the Civil Service Commission with enforcement responsibilities, it was sensible for Congress to use this "existing statutory scheme" and bureaucracy in age discrimination cases as well. The Civil Service Commission's implementing regulations, promulgated soon after passage of the 1974 amendments, reflected this purpose, for they essentially made existing EEO regulations applicable to ADEA cases. 5 C.F.R. 713.501, as added, 39 Fed. Reg. 24351 (1974).

at 4920. Therefore, the only inference with respect to the availability of jury trials that may be drawn from Congress' adoption of Title VII procedures, in lieu of FLSA procedures, in federal sector ADEA cases is that Congress did *not* intend to confer a right to trial by jury in such cases. See *Lorillard* v. *Pons*, *supra*, 434 U.S. at 581, 583-585.

c. The 1978 Amendments

Any remaining doubt on the intention of Congress not to allow jury trials in federal sector ADEA cases is dispelled by consideration of the circumstances surrounding passage of the 1978 amendments to the Act.

As we have explained, following the 1974 amendments, neither Section 7(c) nor Section 15(c) of the ADEA mentioned a right to trial by jury, and nothing in the legislative history of the 1967 Act or the 1974 amendments suggests that Congress had ever considered the matter. See, *e.g.*, H.R. Rep. No. 805, 90th Cong., 1st Sess. (1967); H.R. Rep. No. 93-913, 93d Cong., 2d Sess. (1974); H.R. Rep. No. 93-953, 93d Cong., 2d Sess. (1974). Indeed, Congress did not address the availability of jury trials in ADEA suits until 1977, during floor consideration of a bill to revise the ADEA. Senator Kennedy, in response to conflicting court of appeals' decisions,[18] offered an amendment to "clarify" Section 7(c) of the Act in order to guarantee the availability of jury trials.

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[18] Compare *Rogers* v. *Exxon Research & Eng'r Co.*, 550 F.2d 834 (3d Cir. 1977) (right to jury trial), cert. denied, 434 U.S. 1022 (1978), and *Pons* v. *Lorillard*, 549 F.2d 950 (4th Cir. 1977) (same), aff'd, 434 U.S. 575 (1978), with *Morelock* v. *NCR Corp.*, 546 F.2d 682 (6th Cir. 1976) (no right to jury trial), vacated and remanded, 435 U.S. 911 (1978).

See 123 Cong. Rec. 34317-34318 (1977). The Senate adopted this amendment. *Id.* at 34318.[19] The House bill, however, did not contain a comparable provision.

Before the bill to amend the ADEA was reported out of the Conference Committee, this Court rendered its decision in *Lorillard* v. *Pons*, *supra*, holding as a matter of statutory construction that an employee has a right to trial by jury in an ADEA suit brought against a private employer under Section 7(c). After the *Lorillard* decision, the Conference Committee recommended and Congress enacted the present Section 7(c)(2) of the Act, which is a somewhat revised version of the jury trial amendment passed by the Senate. But the Conferees did not recommend, and Congress did not enact, any corresponding amendment of Section 15(c) to provide for jury trials in federal sector cases.

As Judge Tamm noted, Congress' failure to amend Section 15(c) to provide for jury trials in federal sector cases "cannot be deemed inadvertent" (Pet. App. 22a-23a n.8):[20]

> The Kennedy amendment, though adopted on the Senate floor with little debate, received careful consideration in the conference committee, which altered it to clarify the right to jury trial when

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[19] Senator Kennedy made clear that the Senate's action was not intended "to define other circumstances under which a jury trial is required" and that the decisional law holding that no jury trial is required under Title VII—after which Section 15 of the ADEA was patterned—"is unaffected by this section." 123 Cong. Rec. 34318 (1977).

[20] We do not suggest, of course, that legislative inadvertence properly could support a conclusion that Congress had affirmatively authorized trial by jury in suits against the federal government.

> liquidated damages were involved. *See* H.R. [Conf.] Rep. No. 950, 95th Cong., 2d Sess. 13-14 [(1978)[21]] * * *. The conference committee also altered [Section 15], amending subsection (a) and adding subsections (f) and (g) to authorize studies of age discrimination. *Id.* In amending both sections as it did, Congress could not have overlooked the need to amend [Section 15(c)] to allow jury trials for government employees if it had so wished.

Congress' addition of Subsection (f) to Section 15 renders the failure to amend Subsection (c) of that Section particularly significant. Subsection (f) provides that "[a]ny personnel action of any department, agency or other entity referred to in Subsection (a) of this section shall not be subject to, or affected by, any provision of this chapter, other than the provision of section 631(b) of this title and the provisions of this section." 29 U.S.C. (Supp. II) 633 a(f).[22] The Conference Report states that this provision, which was contained in the House bill but not the Senate bill, "*makes it clear that section 15 of the act relating to federal employment is independent of any other section of the act,* except section 12(b) which contains the age limitation for federal employees." H.R. Conf. Rep. No. 950, 95th Cong., 2d Sess. 11 (1978) (emphasis added). See also H.R. Rep. No. 95-527, 95th Cong., 1st Sess. 11 (1977)

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[21] The question of the availability of jury trials on claims for liquidated damages was left open by the Court in *Lorillard*. See 434 U.S. at 577 n.2.

[22] Section 12(b), 29 U.S.C. (Supp. II) 631(b), provides that Section 15 applies only to federal employees or applicants for federal employment who are at least 40 years of age. The significance of Section 12(b) is that it contains no upper age limit, unlike Section 12(a), which applies to employees in the private sector and in state and local government.

("Section 15 * * * is complete in itself"). Since Congress was given this vivid and contemporaneous reminder that other procedural and substantive provisions of the Act do not apply to personnel practices of the federal government, Judge Tamm surely is correct that "Congress could not have overlooked the need to amend [Section 15(c)] to allow jury trials for government employees if it had so wished" (Pet. App. 22a-23a n.8).[23] And, of course, it is not surprising that Congress did not do so, in view of its virtually uniform practice of not allowing jury trials in actions against the federal government.

In sum, the text and legislative history of the 1974 and 1978 amendments to the ADEA are devoid of the slightest expression of intent to confer a right to jury trial in actions against the federal government; at every turn, the signs point in the opposite direction.

C. The Court Of Appeals Erred In Implying A Right To Trial By Jury From The Act's Provision For Jurisdiction In Federal District Courts And Its Authorization For The Award Of "Legal" Relief In Federal Sector Cases

Despite the absence of any expression of congressional intent to confer a right to trial by jury in ADEA suits against the federal government, the court of appeals nonetheless held that such a right could be inferred from the language in Section 15(c) permitting such actions to be brought in "any Federal district court of competent jurisdiction" and providing for the award of "legal or equitable relief." But

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[23] See also *Edmondson* v. *Simon*, 87 F.R.D. 487, 489-490 (N.D. Ill. 1980), reprinted in the appendix to our reply brief at the petition stage, at 5a-6a.

these wholly unexceptional features of Section 15(c) do not reflect an intent to convey the consent to trial by jury that Congress has withheld with respect to virtually every other cause of action against the federal government.

1. *The Conferring of Jurisdiction on the District Courts*

The court of appeals' inference of a right to jury trial in this case was based primarily on the "fact that Congress gave jurisdiction over ADEA suits against the federal government to the District Courts rather than the Court of Claims" (Pet. App. 10a). The court of appeals cited nothing in the legislative history to support this inference, and we have found nothing. Indeed, there is no indication in the legislative history that Congress ever considered vesting jurisdiction in the Court of Claims.

There are a number of reasons, wholly unrelated to the availability of jury trials, why Congress may have chosen to limit jurisdiction to federal district courts. District courts (along with state courts) already had jurisdiction of private sector ADEA cases under Section 7(c).[24] Congress may simply have decided to follow the same course in federal sector cases and referred specifically to federal district courts only to ensure that state courts would not have jurisdiction of actions brought against the federal government.[25] Moreover, exclusive district court jurisdiction

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[24] Section 7(c) provides for the bringing of a civil action in "any court of competent jurisdiction." 29 U.S.C. (Supp. II) 626(c).

[25] A grant of jurisdiction to federal district courts in actions between private parties certainly does not imply a concomitant grant of a statutory right to jury trial in those actions. Thus, if Congress simply provided for district court

under Section 15(c) of the ADEA is consistent with the jurisdictional references in Title VII of the Civil Rights Act of 1964 (see 42 U.S.C. 2000e-5(f)(3) and 16(c)), under which there is no right to jury trial. Yet another explanation for district court jurisdiction is that the district courts are accustomed to awarding equitable relief of the type authorized under Section 15(c), but the Court of Claims is not. See *United States* v. *King*, 395 U.S. 1, 3 (1969).[26]

In any event, Rule 38(a) of the Federal Rules of Civil Procedure provides that the right to trial by jury "as declared by the Seventh Amendment to the Constitution or as *given by a statute of the United States* shall be preserved to the parties inviolate" (emphasis added). This language certainly does not state a general rule that jury trials are to be presumed whenever Congress provides for cases to be brought in the district court. To the contrary, Rule 38(a) renders it necessary to look elsewhere for a specific, affirmative grant of the right where, as here, the Seventh Amendment does not apply.

In attaching significance to the jurisdictional grant, the court of appeals (and the authorities it cited) placed substantial reliance on *United States* v. *Pfitsch*, 256 U.S. 547 (1921). There, Congress had conferred jurisdiction on the district courts to hear suits under Section 10 of the Lever Act (ch. 53, 40

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jurisdiction in federal sector cases because it had done so in private sector cases, no inference whatever could be drawn respecting the right to trial by jury in federal sector cases.

[26] Distributing these cases among the district courts also avoids the substantial increase in the docket of the Court of Claims that would result if all federal sector ADEA cases were concentrated there. It provides a more convenient forum for plaintiffs as well.

Stat. 279), without limitation of the amount in controversy, to recover just compensation for certain war supplies requisitioned by the federal government. The question presented was whether the grant of jurisdiction was to be exercised in accordance with the Tucker Act (thus removing for this category of cases the limitation of district court jurisdiction under the Tucker Act to claims involving less than $10,000) or whether the grant of jurisdiction more resembled the ordinary jurisdiction of the district courts. The issue was raised because it affected the manner of appellate review (256 U.S. at 549), but the Court observed that its decision would also incidentally affect the right to a jury trial (*id.* at 550). The Court noted that Congress had considered and rejected a proposal to provide that claims under Section 10 of the Lever Act be brought pursuant to the Tucker Act, with its express preclusion of jury trials (*id.* at 550-551). Thus, in the Court's view, Congress had the question of jurisdiction "presented to its attention in a most precise form," and the Court found it "difficult to conceive of any rational ground for rejecting the clear and explicit amendment [providing for Tucker Act jurisdiction] except to accord a trial by jury" (*id.* at 552).

The validity of the dictum in *Pfitsch* regarding the availability of jury trials may be questioned, even on the facts there involved.[27] But however that may be,

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[27] One of the two lower court decisions relied upon by the Court for its observation that the case would be tried to a jury if district court jurisdiction was not under the Tucker Act was *Filbin Corp.* v. *United States*, 266 F. 911 (E.D.S.C. 1920). See 256 U.S. at 549. In *Filbin*, the Court analogized a requisition of property under Section 10 of the Lever Act to an exercise of the power of eminent domain or condem-

there is no indication in the present case, as there was in *Pfitsch*, that Congress ever considered either the possibility of conferring jurisdiction of cases against

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nation and concluded that the Seventh Amendment itself guarantees a jury trial in an action under that section to recover just compensation. See also *Filbin Corp.* v. *United States*, 265 F. 354, 357-359 (E.D.S.C. 1920), citing *Beatty* v. *United States*, 203 F. 620 (4th Cir. 1913). The holdings in *Filbin* and *Beatty* were not followed by other courts, see 5 J. Moore, *Federal Practice* ¶ 38.32[1], at 254-260 (2d ed. 1980), and the suggestion that the Seventh Amendment guarantee applies in condemnation proceedings was rejected by this Court in *United States* v. *Reynolds*, 397 U.S. 14 (1970). The other case relied upon by the Court in *Pfitsch* (*United States* v. *McGrane*, 270 F. 761 (3d Cir. 1921)) contains little discussion of the jury trial question and also reflects some doubt about the constitutionality of depriving the plaintiff of trial by jury. 270 F. at 764.

Moreover, when *Pfitsch* was decided, Section 566 of the Revised Statutes (later codified at 28 U.S.C. (1925 ed.) 770) provided: "The trial of issues of fact in the district courts, in all causes except cases in equity and cases of admiralty and maritime jurisdiction, and except as otherwise provided in proceedings in bankruptcy, shall be by jury." Because *Pfitsch* involved an action at law, the Court might have assumed, *sub silentio*, that the claim fell within the reach of the statutory jury trial guarantee in Rev. Stat. 566 unless it was exempted from that provision by the Tucker Act's express prohibition of trial by jury.

The validity of such a construction of Rev. Stat. 566 is now academic, however, because the Revision Act of 1948 repealed the pertinent portion of 28 U.S.C. (1940 ed.) 770. See ch. 646, Section 39, 62 Stat. 992. Compare *Pernell* v. *Southall Realty*, 416 U.S. 363, 365-366 (1974). As a result, there is no longer any generally applicable statutory right to jury trial in federal district court as there was when *Pfitsch* was decided, even assuming that the statutory right could have been held to attach in suits against the United States.

Respondent argues (Br. in Opp. 14-15) that the right to trial by jury nonetheless remains in effect under the federal

the federal government on the Court of Claims rather than the district courts or the wisdom of authorizing jury trials in such cases. Moreover, as we have already explained (see pages 30-31, *supra*), one can readily "conceive of [a] rational ground"—indeed, several grounds—for conferring jurisdiction on district courts in federal sector ADEA cases that have nothing to do with jury trials. We repeat only one of them here: Section 15(c) of the ADEA, unlike the statute in *Pfitsch*, authorizes equitable relief, which Congress may have thought would more appropriately be considered by the district courts.[28]

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rules. This contention is in error. The original advisory committee note to Rule 38 states that the right to jury trial declared in 28 U.S.C. (1940 ed.) 770 and similar statutes was "unaffected by this rule." Rule 38 merely implements the substantive right to a jury trial declared elsewhere, as in that statute. *Morgantown* v. *Royal Ins. Co.*, 337 U.S. 254, 258 (1949); 28 U.S.C. 2072 (Federal Rules of Civil Procedure "shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution."). It is true that the Reviser's Note to 28 U.S.C. 1873 (which carried forward the second sentence of 28 U.S.C. (1940 ed.) 770) inexplicably states that the jury trial provision in the first sentence "was omitted as covered by Rule 38 of the Federal Rules of Civil Procedure". But as Professor Moore has observed: "This reason is inadequate, for Rule 38 contains no affirmative grant of jury trial, but merely preserves the right 'as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States'. Thus, insofar as [Section] 770 gave a statutory right, which is now repealed, *there is nothing to take its place.*" 5 J. Moore, *Federal Practice* ¶ 38.07[2], at 37 (2d ed. 1980) (footnotes omitted; emphasis added).

[28] The court of appeals also relied (Pet. App. 11a) on *Law* v. *United States*, 266 U.S. 494 (1925), in attaching significance to the grant of jurisdiction to district courts. But

2. *The Provision for Award of "Legal or Equitable" Relief*

The court of appeals also found support for its conclusion in the language of Section 15(c) providing that a person aggrieved may bring a civil action for such "legal or equitable relief as will effectuate the purposes" of the Act. See Pet. App. 11a. The majority noted (*ibid.*) that the Court in *Lorillard* had relied on the provision in Section 7(c) authorizing the award of "legal" relief to buttress its finding of a statutory jury trial right (434 U.S. at 583). On the assumption "that Congress meant to confer the same rights when it used the same term in authorizing suits against the Government" (Pet. App. 11a), the court of appeals inferred that Congress also intended jury trials to be available in federal section ADEA cases. This reasoning is flawed for a number of reasons.

As we have noted, *Lorillard* involved an action brought against a private employer under Section 7(c) of the ADEA. The plaintiff argued that the Seventh Amendment guarantees a right to trial by jury in a private action for lost wages under that section or, alternatively, that the ADEA itself provides such a right. The Court decided the case on statutory grounds, finding that " 'a construction of the statute is fairly possible by which the [constitutional] question may be avoided' " (434 U.S. at 577, quoting *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932)).

Law merely cites *Pfitsch*, adding nothing to the analysis (266 U.S. at 496). The discussion of the jury trial right in that case was dictum in any event because the district court had granted the government's motion to strike the jury trial demand, and this Court reversed for reinstatement of the district court's judgment against the government sitting without a jury.

The principal basis of the Court's decision in *Lorillard* was that, when Congress incorporated the FLSA enforcement scheme into Section 7 of the ADEA, it adopted the settled practice of making jury trials available in such cases. 434 U.S. at 580-583. That aspect of the holding in *Lorillard* has no application here, because Congress did not incorporate the FLSA enforcement scheme in Section 15 of the ADEA. See 29 U.S.C. (Supp. II) 633a(f). It instead followed the Title VII model. See pages 23-26, *supra*.[29] In construing the statute to avoid a constitutional question under the Seventh Amendment, the Court also found it significant that Section 7(b) of the Act authorizes a district court to grant " '*legal* or equitable relief' " and Section 7(c) authorizes employees to bring actions for " '*legal* or equitable relief' " (434 U.S. at 583; emphasis supplied by the Court). The Court viewed the word "legal" as a term of art in this context, because "[i]n cases in which legal relief is available and legal rights are determined, the Seventh Amendment provides a right to jury trials" (*ibid.*, citing *Curtis* v. *Loether*, *supra*, 415 U.S. at

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[29] In any event, there would be no statutory right to jury trial under Section 15(c) even if that section were thought to be analogous to the FLSA. The lower court cases cited by the Court in *Lorillard* recognizing a right to jury trial in FLSA actions all appear to have rested on the Seventh Amendment, not the FLSA itself. See *Wirtz* v. *Jones*, 340 F.2d 901, 903-904 (5th Cir. 1965); *Lewis* v. *Times Publishing Co.*, 185 F.2d 457 (5th Cir. 1950); *Olearchick* v. *American Steel Foundries*, 73 F. Supp. 273, 277-279 (W.D. Pa. 1947). These cases therefore do not suggest that there is a statutory right to a jury trial against the federal government under the FLSA or, by analogy, under the ADEA. To the contrary, the absence of any established right to trial by jury in FLSA actions against the United States would dictate, under the reasoning of *Lorillard*, that trial by jury be similarly unavailable in ADEA actions against the United States.

195-196). Because the word carried an established implication with respect to the availability of jury trials under the Seventh Amendment, the Court could infer that "Congress knew the significance of the term 'legal,' and intended that there would be a jury trial on demand" in an action to enforce liability for lost wages deemed to be unpaid minimum wages or overtime compensation for purpose of the FLSA (434 U.S. at 583).

When a constitutional question is presented, as in *Lorillard*, it is appropriate to indulge the presumption that Congress would not intend a grudging availability of jury trials in the types of private causes of action to which the Seventh Amendment generally applies and, therefore, that Congress itself is fully prepared to receive into ADEA procedures applicable in such causes the right to trial by jury that is ordinarily thought to result from the availability of legal relief. But no similar considerations underlie this case.

Section 7(b) and (c) of the ADEA, involved in *Lorillard*, have no application to actions brought against the federal government. This case arises under Section 15(c), which, as shown above, was added in 1974 (and amended in 1978) to establish wholly separate substantive and procedural provisions governing age discrimination in federal employment. Moreover, there is no need here, as there was in *Lorillard*, to consider whether it is "fairly possible" to construe the pertinent civil action provision to confer a jury trial right in order to avoid a constitutional question, because the Seventh Amendment does not apply to suits against the federal government. The issue is whether Congress affirmatively authorized jury trials.

By the same token, the word "legal" cannot be deemed a term of art as respects the availability of

jury trials in cases involving the federal government. Congress—and the Seventh Amendment itself—have always treated the jury trial issue differently in the context of actions at law against the government. Congress therefore cannot be thought to have attached any particular significance to the term "legal" when it enacted a separate section of the ADEA dealing with federal employment, and it would be improper to infer an intent to confer a right to jury trial from the use of the word in Section 15(c).[30]

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[30] Moreover, it is not clear that the Court actually held in *Lorillard* that Congress had affirmatively *granted* a statutory right to trial by jury in such actions that is wholly independent of the Seventh Amendment right. The decision can instead be read to hold that Congress had, in effect, deemed a suit brought under Section 7(c) to recover lost wages to be the type of action at law to which the Seventh Amendment guarantee attaches. The Court found that, by using the word "legal," Congress had accepted the ordinary consequences of that characterization for jury trial purposes; Congress could thereby be said to have *received* into ADEA procedures (not *granted*) the jury trial right that the Seventh Amendment guarantees in suits at common law. In doing so, Congress would have obviated the need for the Court to undertake its own determination of the constitutional significance of the relief Congress made available.

This reading of *Lorillard* is also suggested by the Court's principal ground for the decision—the incorporation in Section 7 of the FLSA enforcement scheme and procedures, under which a right to trial by jury had been recognized. Significantly, as noted above (see note 29, *supra*), the FLSA decisions cited by the Court in *Lorillard* all appear to have held that an action to recover unpaid minimum wages or overtime compensation is a suit at common law to which the Seventh Amendment guarantee attaches, not that Congress had affirmatively granted an independent statutory right to jury trial in FLSA cases. Accordingly, when Congress patterned Section 7 of the ADEA after the FLSA, it can be held to have acquiesced in these decisions interpreting

The court of appeals read too much into the use of the word "legal" for another reason as well. Under Section 15, age discrimination in federal employment, unlike that in the private sector covered by Section 7, may be remedied either through administrative action by the EEOC (Subsection (b)) or through a civil action in district court (Subsection (c)). Section 15(b), in language drawn directly from the parallel provision in Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(b)), authorizes the EEOC to enforce the substantive prohibition in Section 15(a) "through appropriate remedies, including reinstatement or hiring of employees *with or without backpay*, as will effectuate the policies" of Section 15 (emphasis added). The authority to award relief under this language clearly is equitable or discre-

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the provision for the award of unpaid minimum wages and overtime compensation in such a way as to bring it within the scope of the Seventh Amendment guarantee, and, as a result, to have intended the provision for parallel relief under Section 7 of the ADEA to be interpreted in the same way. If so, the incorporation of FLSA procedures into Section 7 of the ADEA is merely an acquiescence in constitutional holdings, not an independent grant of a statutory right to trial by jury.

If the discussion in *Lorillard* regarding the availability of "legal" relief is read in this manner, it is even more clearly inapplicable here. Under this reading, Congress simply acknowledged that the Seventh Amendment applies of its own force in an action under Section 7(c). Because the Seventh Amendment has no application in an action against the federal government, the jury trial right afforded by that Amendment would not attach of its own force in an action against the federal government under Section 15(c), even assuming that Congress acknowledged that the "legal" relief available under Section 15(c) is of the type that would invoke the Seventh Amendment guarantee in a suit between private parties. But see pages 39-41, *infra*.

tionary in nature. See, *e.g.*, *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405, 415-422 (1975). In particular, the provision for reinstatement or hiring "with or without backpay" stands in sharp contrast to the provision in Section 7(b) that lost compensation is an "[a]mount owing[]" and is "deemed to be unpaid minimum wages or unpaid overtime compensation" to which an individual in the private sector has an absolute entitlement. *Lorillard* v. *Pons*, *supra*, 434 U.S. at 584. Indeed, it was the recovery of this absolute entitlement that was considered in *Lorillard* to be the "legal relief" authorized in Section 7(b) and (c). See 434 U.S. at 583 n.11. Plainly, an individual has no entitlement to "legal relief" in this sense at the administrative level under Section 15(b).

If Congress contemplated the relief available at the administrative level under Section 15(b) to be equitable in nature, it is reasonable to assume that such relief is essentially equitable in nature in judicial proceedings as well, notwithstanding the presence of the word "legal" in Section 15(c).[31] To interpret Section 15(c) as authorizing the award of broader and nondiscretionary relief that is not available under Section 15(b) would only encourage employees to bypass the administrative remedies Congress obviously intended to resolve many complaints. See *Brown* v. *GSA*, 425 U.S. 820, 833 (1976).

As is evident, neither the provision for cases under Section 15(c) to be brought in district court nor the use of the word "legal" in that section can be

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[31] This conclusion is supported by the fact that Congress patterned the enforcement scheme of the federal sector ADEA provisions after Title VII, which grants courts jurisdiction to award equitable relief against employment discrimination. See page 25, *supra*.

thought to manifest a congressional intent that the plaintiff in an ADEA action against the federal government have a right to trial by jury. The court of appeals' reliance on these factors was especially inappropriate in view of Congress' failure expressly to provide for jury trials in Section 15(c) when it amended Section 7(c) in 1978 to provide for such trials in private sector cases, and in view of the other indications in the legislative history that Congress did not intend to confer a right of jury trial when it enacted a separate section governing age discrimination in the federal sector.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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